TA SECURITIES BHD

v.

LING CHONG CHO

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HELILIAH MOHD YUSOF JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: W-03-153-2004]
7 MAY 2008

SECURITIES: *Stockbroker - Recovery for moneys on transactions made on defendant's account - Whether margin account a money lending transaction - Whether triable issues raised entitling defendant leave to defend*

The appellant (plaintiff in the court below) appealed against the decision of the learned judge granting the respondent (defendant in the court below) unconditional leave to defend the plaintiff's action. The plaintiff was a stock broking company which had brought an action to recover a sum of RM7,127,322.82 against the defendant who had an account with the plaintiff company. In her defence, the defendant raised three issues: (i) that the margin account created in her favour was a money lending transaction; (ii) that the operation of the account with the plaintiff was handled entirely by her husband; and (iii) that she was unaware of the transactions carried out by the plaintiff and hence she was not bound by them.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The provision of a margin account by a stockbroker to his customer is not a money lending transaction. All that the stockbroker does is to give a line of credit to his customer instead of insisting on advance cash deposit. It followed that the point taken by the defendant did not amount to a *bona fide* triable issue. (para 4)

(2) It was no answer for the defendant to allege that the transactions in the account were carried out at her husband's behest. The plaintiff when receiving instructions from the defendant's husband would have been entitled to assume that

A he was acting on his wife's behalf because they must have been entirely within one another's confidence (see the case of *Spiro v. Lintern*). It was therefore not open for the defendant now to assert that her husband acted without her knowledge or authority. (para 5)

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(3) The undisputed contemporaneous documentary evidence did not support the defendant's plea that she was wholly unaware of the transaction. Contract notes were sent to the defendant at the address shown in her own affidavit. On receiving them C she took no steps to disavow any of the transactions to which they related. Her attempt to do so after service of writ must be regarded as spurious if not highly suspect. (para 6)

(4) The defence was a sham when viewed against the contemporaneous documentary evidence. The learned judge D was wrong in holding that the defendant had raised *bona fide* triable issues entitling her to leave to defend. (para 7)

Bahasa Malaysia *Translation Of Headnotes*

E Perayu (plaintif di mahkamah di bawah) merayu terhadap keputusan yang arif hakim kerana memberi kebenaran tanpa syarat kepada responden (defendan di mahkamah di bawah) memasukkan pembelaan terhadap tuntutan plaintif. Plaintif adalah sebuah syarikat broker saham dan telah mengemukakan tuntutan bagi F mendapat kembali sejumlah RM7,127,322.82 dari defendan yang membuka akaun dengan syarikat plaintif. Dalam pembelaannya, defendan membangkitkan tiga isu, iaitu (i) bahawa akaun margin yang dibuka untuk manfaat beliau adalah sebenarnya satu transaksi pinjaman wang; (ii) bahawa operasi akaun dengan plaintif G dikendalikan sepenuhnya oleh suami beliau; dan (iii) bahawa beliau tidak menyedari tentang transaksi-transaksi yang dijalankan oleh plaintif berakibat beliau tidak terikat dengannya.

Diputuskan (membenarkan rayuan)
H Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Peruntukan akaun margin oleh seorang broker saham kepada pelanggannya bukan satu transaksi pinjaman wang. Apa yang dilakukan oleh broker saham hanyalah memberi talian pinjaman I kepada pelanggannya sebagai ganti bayaran pendahuluan tunai. Ianya mengikut bahawa persoalan yang dibangkitkan defendan bukan suatu isu yang boleh dibicarakan.

(2) Adalah tidak memadai bagi defendan untuk mendakwa bahawa transaksi pada akaun dijalankan menurut kehendak suaminya. Plaintif, bilamana menerima arahan dari suami, berhak membuat andaian bahawa suami bertindak bagi pihak isterinya kerana mereka berada dalam kedudukan saling percaya mempercayai di antara satu sama lain (lihat kes *Spiro v. Lintern*). Oleh itu, adalah tidak terbuka bagi defendan untuk mengatakan sekarang bahawa suami beliau bertindak tanpa pengetahuan atau keizinannya.

(3) Keterangan dokumen kontemporari yang tidak dipertikai tidak menyokong pengataan defendan bahawa beliau langsung tidak menyedari mengenai transaksi. Nota-nota kontrak telah dihantar ke alamat seperti yang tertera di dalam afidavit beliau sendiri. Setelah menerimanya beliau tidak mengambil sebarang langkah untuk menyangkal mana-mana transaksi tersebut. Percubaan beliau untuk berbuat demikian selepas penyampaian writ harus dilihat sebagai berpura-pura jikapun tidak disangsikan.

(4) Pembelaan, dilihat dari sudut keterangan dokumen kontemporari, adalah satu helah semata-mata. Yang arif hakim khilaf dalam memutuskan bahawa defendan telah membangkitkan isu-isu boleh dibicarakan *bona fide* yang dikatakan memberikan hak kepadanya untuk memasukkan pembelaan.

Case(s) referred to:

Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1979] 1 LNS 60 FC ***(refd)***

Spiro v. Lintern [1973] 3 All ER 319 ***(refd)***

For the plaintiff/appellant - CG Chew; M/s Chris Kah & Chiew

For the defendant/respondent - Rajesh Kumar (R Menon with him); M/s Rajesh Kumar

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D5-22-291-2002]

Reported by Usha Thiagarajah

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JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

B **[2]** This appeal is directed against the order of the High Court granting the respondent (defendant in the court below) unconditional leave to defend the plaintiff's action. The brief facts of the case are these. The plaintiff (appellant before us) is a stock broking company. At all material times one Ignitious Luke Jr Tan C Keng Hee was a remisier in the plaintiff company. On 6 November 1996 an individual account was opened with the plaintiff. The account opening form shows the defendant as the account holder. There is a signature on that form which is said to be the defendant's signature. It is not alleged by the defendant that the D signature is a forgery. There is no dispute that it was the defendant who opened the account. Later, contract notes for transactions done on the account were sent to the defendant at her address. Later still, dispute arose as to the indebtness of the defendant to the plaintiff. The documents show that at all material E times a sum of RM7,127,322.82 was owing from the defendant to the plaintiff. In due course the plaintiff brought an action to recover this sum and took out a summons for judgment. The summons came before the registrar who granted an order in its terms. The defendant then appealed to the judge in chambers who F allowed the appeal and granted the defendant unconditional leave to defend. So much for the facts.

[3] In her affidavit seeking leave to defend the defendant raised three issues. First, that the margin account that had been created G by the plaintiff in her favour was a moneylending transaction. Second, that the operation of the account with the plaintiff was handled entirely by her husband and not by her. She was therefore not bound by the transactions in question. Third, she was unaware of the transactions that had been carried out by the H plaintiff in her account and she was therefore not bound by them.

[4] Taking the first issue, it is our judgment that the provision of a margin account by a stock broker to his customer is not a moneylending transaction. All that the stock broker does is to give I a line of credit to his customer instead of insisting on an advance cash deposit. In *Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd*

[1979] 1 LNS 60, the former Federal Court held that the Money Lenders Ordinance 1951 applied only to moneylenders. It follows that the point taken by the defendant does not amount to a *bona fide* triable issue.

[5] As for the second line of defence, in our judgment it is no answer for the defendant to allege that the transactions in the account were carried out at her husband's behest. A similar defence taken by a husband in *Spiro v. Lintern* [1973] 3 All ER 319 failed. In the course of delivering the judgment of the English Court of Appeal, Buckley LJ held that the plaintiff in that case was entitled to assume that the wife had the husband's authority to act because "of the fact that the first and second defendant were husband and wife and so presumably entirely within one another's confidence." So too here. The plaintiff when receiving instructions from the defendant's husband would have been entitled to assume that he was acting on his wife's behalf because they must have been entirely within one another's confidence. It is therefore not open for the defendant now to assert that her husband acted without her knowledge or authority.

[6] Now for the final point. The plea that the defendant was wholly unaware of the transaction flies in the face of the undisputed contemporaneous documentary evidence. As we have already said, contract notes were sent to the defendant at the address shown in her own affidavit. On receiving them she took no steps to disavow any of the transactions to which they related. Her attempt to do so after service of writ must be regarded as spurious if not highly suspect.

[7] So, when viewed against the contemporaneous documentary evidence the defence is really a sham. A court properly directing itself on the material available in this case and correctly directing itself on the law would have so concluded. That is indeed the conclusion the registrar arrived at. In our judgment the learned judge was clearly wrong in holding that the defendant had raised *bona fide* triable issues entitling her to leave to defend. He should not have disturbed the order made by the registrar.

[8] Before concluding the judgment there is one observation we would make. In several cases we have said that this court will not readily interfere with an order of the High Court granting unconditional leave to defend. We will certainly not trawl through

A the evidence to see whether the issues raised are *bona fide* triable. But this is not an ordinary case. Here the documents involved are few and undisputed. The only point is whether the defence taken is a mere sham.

B **[9]** For the reasons already given this appeal is allowed. The order of the learned judge is set aside. The order of the registrar is restored. The defendant must pay the costs of this appeal and those incurred in the court below. The deposit in the court shall be refunded to the appellant.

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